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IN THE

Supreme Court of the United States

October Term, 1952

No. 628

ABIE A. SHER,

Petitioner

v.

CLIFFORD W. DEHAVEN and CLAYTON ROSE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABIE A. SHER,
Petitioner.
By: WALTER J. CAHILL,
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To The Honorable, the Chief Justice of the United States, and the Associates Justices of the Supreme Court of the United States:

Your petitioner, Abie A. Sher, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above captioned case on October 2, 1952, rehearing denied December 17, 1952.

OPINIONS BELOW

The opinion announced on October 2, 1952, is found on page 164 of the record. The order overruling the petition for rehearing is found on page 173 of the record.

The verdict and judgment in the United States District Court for the District of Columbia is found at page 17A of the appendix.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Section 1254(1) of the Judicial Code (Tit. 28, U. S. C. A.).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I The courts below failed to give proper effect to rule 16 of the Federal Rules of Civil Procedure by holding, in effect, that the pretrial memorandum made by the District Court judge was not controlling on the subsequent course of the action.

II. The courts below failed to give proper effect to section 2072, Title 28, U. S. C., and rules 33 and 34 of the Federal Rules of Civil Procedure, in holding that section 308, Title 14, 1940 edition of the Code of the District of Columbia, was controlling with respect to the matters sought to be obtained from the plaintiff by the defendant, pursuant to the above mentioned rules.

III. Determination of the extent to which Section 2072, Title 28 U. S. C. and Federal Rules 33 and 34 supersede local statutes with respect to discovery of facts prior to trial is a matter of great public importance.

An authoritative determination of this question would prove a helpful guide to the District Courts in future litigation of this character.

IV. The trial court failed to give proper effect to the Federal Rules of Civil Procedure providing for the dismissal of the action upon the plaintiff's refusal to an-

swer interrogatories as required by rule 33 of the Federal Rules of Civil Procedure.

V. The trial court failed to give proper effect to federal rule 34 of the Federal Rules of Civil Procedure in not requiring the plaintiff to produce, upon motion, documents bearing upon his physical condition.

VI. The decision of the court below is in conflict with the decisions of other federal courts respecting the effect to be given to the Federal Rules of Civil Procedure here involved.

STATUTES AND RULES INVOLVED

28 U. S. Code 2072, paragraph 4, and Rules 16, 33, 34, 35, and 37(a) and (b)(III), Title 14, Section 308, District of Columbia Code.

STATEMENT

On November 30, 1948, the respondents herein filed a complaint in two counts, for personal injuries due to negligence, alleging that on May 16, 1948, while respondents were, respectively, the driver and helper in a truck traveling south on South Capitol Street, Washington, D. C., petitioner negligently operated his automobile westerly on Virginia Avenue, and as a result respondent DeHaven "was thrown in and about the cab of the truck, had a concussion of the brain and was otherwise injured, was prevented from working at his job, suffering great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of $1,000."

In count 2 thereof, respondent Rose claimed that "the defendant negligently operated a Dodge Sedan through a 'stop sign' against the plaintiff Clayton Rose who was then riding as a passenger in a truck on South Capitol

Street in a southerly direction across its intersection with Virginia Avenue. As a result, plaintiff was thrown in and about the cab of the truck, had two upper and two lower teeth broken and was otherwise injured, had his wrist watch smashed, suffered great pain in body and mind, incurred expenses for medical and dental attention in the sum of $500 (A. 2A).

Petitioner then filed an answer, and counter claim against respondent DeHaven (A. 7A). Respondent DeHaven filed a reply to the counter claim (A. 10A). On August 14, 1950, pretrial proceedings were had in which the claim to personal injury of respondent DeHaven was solely "permanent injury of pituitary gland as a result of the accident, namely, that it was caused or aggravated as a result of the injury." (A. 10A).

Plaintiff Rose claims "chipped teeth." (A. 10A).

REASONS FOR GRANTING THE WRIT

I. The court erred in interpreting and applying Rule 16 F. R. C. P.

Plaintiff DeHaven claimed "injury to the pituitary gland or aggravation of a dormant condition." This was his sole claim to physical injury. The court admitted in evidence bills and testimony tending to establish respondent DeHaven suffered from pneumonia approximately two and one-half years after the collision; ulcers of the stomach ten months after the collision; and was subjected to surgery for relief of a hyper-tensive condition almost three years after the collision.

> "* * * Such order (Pre-trial Order) when entered controls the subsequent course of action, unless modified at the trial to prevent manifest injustice. * * *"

Rule 16, F. R. C. P.

"* * * The Order limits the issues for trial to those not disposed of by admissions or agreements of counsel," although it has been pointed out that this is an understatement, since the pre-trial judge does not merely eliminate uncontroversial issues but *also formulates the remaining issues to show the real contentions of the parties.*" (Emphasis supplied)

Moore's Federal Practice, 2 Ed. 16.18.

"Subject to the qualification that the Court may modify its order, *the parties are bound by the pre-trial order;* its terms may not be contradicted; and the court should not give instruction contrary to or inconsistent with its order." (Emphasis supplied)

Idem 16.19.

No order modifying this pre-trial order was made or requested. Petitioner was without prior notice either in the complaint or in the pre-trial statement that respondent DeHaven claimed such disabilities, or compensation therefor, was taken completely by surprise by such testimony, and was gravely prejudiced thereby. The admission of this evidence was beyond the scope of the pre-trial order and contrary to the prior decision of the court below enunciated in the case of *Owen v. Schwartz,* 85 U. S. App. D. C. 302, 177 F. 2d, 641, wherein that Court held:

"The purpose of Rule 16, Federal Rules of Civil Procedure, is to formulate the issues for trial, and when the issues are formulated at a pre-trial hearing the court is required to enter an order reciting such action. When entered, such pre-trial order controls the subsequent course of the action."

II. The privilege accorded physicians and surgeons in the District of Columbia is set out by *Title 14, Section 308, D. C. Code,* and states:

"In the courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, confidential in

its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity, * * *"

This statute was enacted May 25, 1896, is in derogation of the common law, and should be strictly construed. The cases referred to by the court below interpreting this Code provision were decided prior to the effectiveness of the Federal Rules of Civil Procedure, except the cases of *Kaplan* v. *Manhattan Life Insurance Company,* 71 App. D. C. 250, 109 F. 2d. 463, and *Eureka Maryland Assurance Company* v. *Gray,* 74 App. D. C. 191, 121 F. 2d, 104, *certiorari denied* 314 U. S. 613. The latter are cases involving breach of contract and not applicable in the instant case wherein the respondent has placed his physical condition in issue.

Petitioner sought only copies of statements made by physicians, who could be contemplated as witnesses, which were in the possession of respondents.

The interpretations of this statute, in these cases made, is in direct conflict with the decision of this Court in *Hickman* v. *Taylor,* 67 S. Ct. 385, 329 U. S. 495, 91 L. Ed. 451, where it is said:

"* * * Thus civil trials in the Federal Courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." (p. 389)

"* * * Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant." (p. 391-92)

"We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. * * * Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery pro-

cedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise." Idem, 392.

"For the present purposes, it suffices to note that the protective color of this privilege (attorney-client) does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation." 392.

"It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case."

"• • • There might be circumstances too, where impossibility or difficulty of access to the witness or his refusal to respond to requests for information or other facts would show that the interests of justice require that such statements (witness' statements) be made available." (concurring opinion) 392.

The Court's decision in the Hickman case clearly sets forth the purpose and objective of the Rules to be the development before trial of all information and evidence which might be adduced at the trial; to make available to each side of a litigation all the facts of the case. Clearly, all the facts in a personal injury case cannot be presented by a defendant if the plaintiff is allowed to withhold from such defendant all the information pertaining to the issues raised by such plaintiff, except such information as can be gleaned by an examination which, in many instances, because of the lapse of time, may be useless in determining the extent of injuries sustained.

The application of the D. C. Code provision, by the courts below, completely nullifies the purpose of the Deposition-Discovery Rules, as enunciated by this Court, in personal injury cases, and in fact will place a premium upon evasion and concealment in such cases.

The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. When the patient himself discloses those ailments by bringing an action in which they are in issue,

there is no longer any reason for the privilege. He cannot have his cake and eat it too.

The best and only intelligent source of information concerning a person's physical injuries is from the physicians who treat him from the outset. Denial to the defendant of access to this information deprives a defendant of the means of properly preparing a defense, or of even being properly informed.

This application of the District of Columbia privilege statute by the courts below also is in conflict with that provision of Title 28, U. S. C., Section 2072, which states:

> "• • • They (Federal Rules) shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force and effect."

It is also in conflict with the decision of *Cox* v. *Pennsylvania Railroad Company,* Southern District of New York, 9 F. R. D. 517, wherein that court said:

> "Plaintiff is hereby ordered pursuant to Rule 34, F. R. C. P. to permit the inspection and copying by or on behalf of the defendant of all doctors reports, referred to by the defendant in the order to show cause dated November 18, 1949. The defendant is entitled to inspect these reports in accordance with the decision of Hickman v. Taylor, etc."

III. In the fiscal year 1952 there were 58,428 actions filed in the United States District Courts. Of this number 14,454, or 24.7%, were personal injury cases. Of this number 1281 were filed in the District of Columbia and the Territories, the vast majority in D. C.

> Annual Report of the Director of the Administrative Office of the United States Courts for 1952, pages 126, 127.

A great many of the cases presented to District Courts revolve around the point herein raised.

The person of a litigant is no longer inviolable under the Federal Rules of Civil Procedure. Certainly greater protection is not intended to be accorded documents containing facts about his person which are relevant to, or issues in, the case.

For other cogent reasons in support of this assignment we refer to assignments II and ~~III~~ IV.

IV. Petitioner filed a motion under Rule 37(b)(III) to strike this complaint or to dismiss this action December 7, 1950 (A. 14A), predicated upon the respondent's wilful failure and refusal to conform to the Federal Rules of Civil Procedure, setting forth particularly the respondent's refusal to answer interrogatories under Rule 33 and to conform to court orders requiring such action. The court overruled this motion and issued a further order to the respondents to answer the interrogatories by the 19th day of January, 1951 (A. 15A). Respondents still failed and refused to comply with the court's order. Petitioner, on February 16, 1951, filed another motion under Rule 37(b)(III) to strike this complaint or to dismiss this action (A. 16A). Respondents deliberately and contumaciously refused to answer the interrogatories and petitioner has not received to this day answers to these interrogatories.

Rule 33, F. R. C. P., provides, in part:

> "* * * The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto * * *."

Respondents filed no objections or answers to the interrogatories served upon them.

April 2, 1951, the court signed an order (A. 17A) denying petitioner's motion to strike. This action of the court was arbitrary and an abuse of its discretion. The record clearly discloses refusal of the respondents to conform to the rules and court orders and that the petitioner below had exercised due diligence in seeking the information essential to his defense. The court, in view of respondents' manifest evasion and persistent efforts at concealment, abused its discretion in not requiring conformity with the rules in that, as developed on trial, petitioner was without any knowledge pertaining to acute and chronic diseases and surgical attention, which respondent DeHaven claimed as consequences of the collision, until confronted with the bills for the same at trial, to his prejudice and deprivation of the right to discovery prior to trial.

V. October 5, 1950, Petitioner filed a motion to compel production of documents, setting forth specific documents he wished to inspect or copy, and stating the reasons therefor (A. 12A). The trial court, on November 7, 1950, signed an Order denying said motion (A. 14A).

June 12, 1948, respondent DeHaven made a written request for a copy of the report of the examination made by petitioner's medical examiner. At the time of argument on this motion, petitioner did not have knowledge of this written request, which had been addressed to petitioner's then representative, but the existence of which was well known to respondent DeHaven. The court directed petitioner to deliver to respondent DeHaven a copy of this report. Thereupon, delivery was made in open court as directed. Respondent (notwithstanding his request of June 12, 1948, for a copy of such report) argued against retention and claimed he did not want

to waive any privilege, whereupon, by direction of the court, the copies were returned to petitioner. This conduct on the part of respondent was contrary to his own knowledge, his duty to the court, and the intent and purpose of the rules.

The order of the court (A. 14A) was contrary to Rule 35.

> "If requested by the party examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. • • •
>
> "(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition."

Immediately upon learning of the existence of this request petitioner sought, by means of a motion to supplement the record in the court of appeals (R. 174), to make this request for a copy of this report from defendant's medical examiner a part of the record on appeal. The motion was denied (R. 180).

VI. In the case of *Cox* v. *Pennsylvania Railroad Company, supra,* the District Court for the Southern District of New York held that the type of information sought in this case must be produced in accordance with this Court's decision in *Hickman* v. *Taylor, supra.*

The Federal District Court of Ohio, in *Fleming* v. *Bernardi,* D. C. Ohio, 1941, 1 F. R. D. 624, held that all privi-

lege, permitting plaintiff to withhold relevant information, was waived by reason of his having recourse to the courts.

Actions of this type, personal injury, are the most numerous single class of actions filed in Federal District Courts.

Should the interpretation of the courts below prevail in this class of cases, defendants will be without substantial defense, as an examination by a physician or even several examinations by physicians cannot be expected to carry as much weight with juries as will the testimony of physicians who have been in long attendance upon the litigant patient.

The plaintiff's deposition may be taken but an evasive litigant or one who pleads ignorance may readily circumvent the purpose of the deposition, as occurred in this case (37A, 38A, 39A, 121A and 122A, Defendant's Exhibits 1 and 2, 153A, 154A).

There is yet another situation, under this interpretation of the Rules, which places the defendant completely at the mercy of the plaintiff and requires him to go to trial in complete darkness; that is where suit is not instituted until after the lapse of a long period of time, on many occasions almost to the full period of limitations. The concurring opinion in *Hickman* v. *Taylor, supra,* points up this situation wherein Mr. Justice Jackson, concurred in by Mr. Justice Frankfurter, stated:

> "There might be circumstances, too, where impossibility or difficulty of access to the witness or *his refusal to respond to requests for information or other facts would show that the interests require that such statements be made available.*" (Emphasis supplied)

The respondent DeHaven was beyond this jurisdiction continuously from June 1948 until the day of trial, with

the exception of about ten days in March and April 1949, according to his testimony at trial.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued by this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 11,244, *Abie A. Sher,* appellant, v. *Clifford W. DeHaven and Clayton Rose,* appellees, and that the judgment of the court below be reversed by this Court, and that your petitioner have such other and further relief in the premises as to this Court may seem just.

ABIE A. SHER,
Petitioner.
By: WALTER J. CAHILL,
CHARLES O. PRATT,
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